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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No.

BEN SUGARMAN,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Ben Sugarman and petitions this Honorable Court for a Writ of Certiorari directed to the

Supreme Court of the State of California and for an Order to the Supreme Court of the State of California to certify the record of that Court to this Court and to reverse the decision of the Court below denying the petitioner, Ben Sugarman, a Writ of Habeas Corpus for violations of constitutional rights asserted under the Fourteenth Amendment to the Constitution of the United States, and particularly challenges as to the unconstitutionality of Sections 954 and 1098 of the Penal Code of the State of California, as construed and applied in this case, denying petitioner procedural due process of law guaranteed by the Fourteenth Amendment.

The petitioner also asks leave to proceed upon certified typewritten record sent to the Court below along with this petition, and in respect to these matters your petitioner, Ben Sugarman, respectfully shows as follows:

OPINION BELOW.

There was no opinion written by the Supreme Court of California in this case.

The petition before the Supreme Court of the State of California was denied—two Justices dissenting, to-wit, Justices Jesse W. Carter and B. Rey Schauer. The Attorney General of California also stipulated before the Supreme Court that the questions raised herein under the Federal Constitution were of fundamental importance.

JURISDICTION.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code and by Rule 38½ Rules of the Supreme Court of the United States.

The petitioner first filed his application for a Writ of Habeas Corpus in the Superior Court of the State of California in and for the County of San Joaquin, on June 9, 1949. That Court denied the hearing without opinion on said date. On June 10, 1949, the petitioner filed a Writ of Habeas Corpus in the District Court of Appeal, Third Appellate District, State of California, which petition was denied by that Court on June 15, 1949. Petitioner thereafter, on July 1, 1949, filed a petition for a Writ of Habeas Corpus in the Supreme Court of the State of California, which petition was denied on July 14, 1949, the Supreme Court of California having considered the said petition on all of the federal grounds asserted first in the Superior Court of the State of California in and for the County of San Joaquin, and again in the District Court of Appeal, Third Appellate District, State of California, and again in the Supreme Court. Justices Jesse W. Carter and B. Rey Schauer both voted for a hearing in the Supreme Court.

This petition is filed within 90 days of the said denial as provided by Rule 38½ Rules of the Supreme Court of the United States.

In each of the petitions there was a challenge to the constitutionality of Section 954 and 1098 of the Penal Code of the State of California, as construed

and applied in this case, under the Federal Constitution, to-wit, under the Fourteenth Amendment to the Constitution of the United States. There was also a challenge as to the invidious treatment in which the petitioner was singled out. The challenge was denied by the California Court, two justices dissenting.

This is a companion case to Ben Sugarman vs. The People of the State of California from the Third Appellate District.

Because all of the questions in the direct appeal from the judgment itself were not asserted under the Fourteenth Amendment to the Constitution of the United States, those questions were again reasserted on the Habeas Corpus proceedings herein and the entire record of the case of People vs. Ben Sugarman was made a part of the record of this proceeding in each of the applications for the Writ of Habeas Corpus before the State of California. Therefore, the State of California has squarely passed upon each and all of the issues under the challenge that the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were asserted in the State of California and denied by that Court.

Jurisdiction, therefore, is conferred under the New Judiciary Code, Section 2102, and by Rule 38½ of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 954 of the Penal Code of California provides as follows:

> "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried

separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count."

Section 1098 of the Penal Code of California provides as follows:

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the Court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by Section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

SUMMARY STATEMENT OF THE FACTS.

As all of the facts surrounding the case are set out in the Statement of Facts in the Petition for the Writ of Certiorari from the judgment in the District

Court of Appeal, State of California, we readopt that statement by reference as though fully set forth here.

In addition thereto, however, we set out the procedure and our reasons for seeking a writ of habeas corpus.

The petitioner, Ben Sugarman, was sentenced to the State Prison under the judgment of the District Court of Appeal, Third Appellate District, from which we sought a writ of certiorari. Since the Supreme Court of California did not pass upon the issues here, nor did the Third Appellate District pass upon the issues under the challenge of unconstitutionality of the statute itself, and since we wanted to present every phase of the issue of unconstitutionality under the Fourteenth Amendment to the Constitution of the United States, we sought in this case, as we did in *Lisenba v. California,* 314 U. S. 166, a writ of habeas corpus to challenge the constitutionality of Sections 954 and 1098 of the Penal Code of the State of California as construed and applied in this case.

We not only challenge the constitutionality of the statutes as construed and applied, but we also challenge the trial as being unfair under the construction of the Fourteenth Amendment to the Constitution of the United States under the facts of this case, and also that the defendant was singled out for invidious treatment by the State of California, in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We presented the issues to the State of California as to whether a person charged individually with an

individual crime or offense and a conspiracy with another individual may be tried en masse before the same jury with other persons separately charged with separate conspiracies and separate crimes.

We have found no case that holds that such procedure and proceedings is due process of law within the United States; and, for the first time a State Court has held that joinder of parties may be had, although the defendants are separately accused of separate alleged crimes and offenses. Thus, the accused herein had to sit through a prolonged trial in which 75% or more of the evidence was against other defendants on other charges. This procedure and proceeding was challenged in the highest Court of the State of California as being in violation of due process of law, which guarantees to every accused in the United States a fair trial by proper American standards. This challenge was denied by the highest Court of the State of California, Justices Jesse W. Carter and B. Rey Schauer, however, voting for hearing.

The Attorney General of the State of California recognized the importance of the fundamental questions herein and stipulated that they were of fundamental importance and should be decided by a high Court.

The petition became highly controversial in California, various district attorneys opposing any decision or hearing on the matter and various public defenders, who represent indigent defendants, urging the hearing on the ground that it would affect a large number of persons they represent.

The record of the trial Court in the trial itself was placed in evidence in this habeas corpus case by reference and is before this Court, having been filed in the proceedings of Ben Sugarman vs. People of the State of California, in the appeal from the judgment.

Thus, every remedy in the State of California has been exhausted both directly from the judgment and by habeas corpus attack, and both Sections 954 and 1098 of the Penal Code of the State of California have been challenged as unconstitutional under the Fourteenth Amendment to the Constitution of the United States and that challenge denied by the highest Court of the State of California, two justices voting for a hearing and the Attorney General of the State agreeing that the question is one of fundamental importance.

STAGES AT WHICH THE DUE PROCESS QUESTION WAS RAISED.

The Due Process Question under the Fourteenth Amendment to the Constitution of the United States in this Habeas Corpus proceeding was first raised in the Superior Court of the State of California in and for the County of San Joaquin on June 9, 1949, and the challenge therein denied by that Court. It was again raised in the District Court of Appeal, Third Appellate District, State of California, on June 10, 1949, and denied by that Court on June 15, 1949. It was again raised in the Supreme Court of the State of California on July 1, 1949, and denied by that Court on July 14, 1949, Justices Carter and Schauer voting for the issuance of the Writ of Habeas Corpus.

QUESTIONS PRESENTED BY THIS WRIT.

I.

WHETHER SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA, AS CONSTRUED AND APPLIED IN THIS CASE, PERMITTING MASS TRIALS OF DEFENDANTS SEPARATELY CHARGED WITH DIFFERENT OFFENSES TO BE TRIED BEFORE ONE AND THE SAME JURY EN MASSE VIOLATES DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER SUCH PROCEDURE AND PROCEEDINGS VIOLATE A FAIR TRIAL GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

WHETHER THE PETITIONER BEN SUGARMAN WAS DENIED THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT HE WAS SINGLED OUT FOR INVIDIOUS TREATMENT BY THE STATE OF CALIFORNIA.

REASONS FOR ALLOWING THE WRIT.

This case involves fundamental questions of criminal law and procedure affecting that fundamental concept which is inherent and at the base of all of our institutions and must govern all of the States of the United States.

The fundamental question in this case is *whether in the United States of America there can constitutionally be a mass trial in any state before the same jury of separate conspiracies, separately stated, and separate offenses against separate individuals, separately stated, all combined in one trial before the same jury; and, whether such procedure is so offensive to due process of law as to require reversal of the judgments below?*

This case also involves the question *whether a State may single out an individual for invidious treatment and unfair trial as was done in this case?*

This Court has been solicitous of the rights of persons accused of crime to receive *fair trial* and to be tried in accordance with humane and ethical standards of justice which inhere in the base of our institutions. We have set an example and are trying to set an example for the world of proper and humane and fair conduct in such trials. The present trial denied that conduct and raised legal questions as to the right to try multiple conspiracies before the same jury in any State of the United States.

This Court is now called upon to pass on whether such procedure is due process in the United States.

The matter is of great importance in the administration of justice in the United States. It was recognized as such by the Public Defenders of the State of California—both of Los Angeles and of San Francisco—who urged the California Court to pass squarely upon these issues which may largely affect a great number of poor persons who could all be herded together and

consolidated into one trial. Various District Attorneys of the State thought it was proper procedure and they controversially opposed such a determination, since under the Ruling of the California Court they could now proceed en masse against many persons before one jury. The importance of the question was recognized by the Attorney General of the State of California—the highest non-judicial officer of the state—who stipulated that the questions involved were of fundamental importance and should be determined by a high Court.

We think, therefore, that this Honorable Court should grant a hearing herein and determine the limits to which a State may go in trying persons en masse before one jury.

CASES BELIEVED TO SUSTAIN JURISDICTION.

Pointer v. United States, 151 U.S. 396, 399, 404;
Optner v. United States, 13 Fed. (2d) 11, 12;
Ashe v. United States, 2 Fed. (2d) 735;
Krulewitch v. United States, 93 L.Ed. 623;
Re Oliver, 333 U.S. 257;
Kotteakos v. United States, 328 U.S. 750, 90 L.Ed. 1557;
McElroy v. United States, 164 U.S. 76, 41 L.Ed. 355;
Carter v. Illinois, 329 U.S. 173, 91 L.Ed. 172;
Buchalter v. New York, 319 U.S. 427, 87 L.Ed. 1492;
Lisenba v. California, 314 U.S. 219, 86 L.Ed. 1166;

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791;
People v. Brower, 207 Pac. (2d) 571.

Wherefore, for the violation of fundamental and fair procedure guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States, and for other reasons set out in this petition, your petitioner respectfully prays that this Court issue its Writ of Certiorari to the Court below, and that it hold that Sections 954 and 1098 of the Penal Code of the State of California as construed and applied in this case are unconstitutional and that the defendant was singled out for invidious treatment in denial of the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States; that, therefore, the judgments and each of them as to the petitioner herein below be reversed.

Dated, Los Angeles, California,
September 21, 1949.

Respectfully submitted,
MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
Of WILLENS AND BOSCOE,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No.

BEN SUGARMAN,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

There was no opinion below in the Habeas Corpus proceedings. The Petition for Writ of Habeas Corpus was denied by the Supreme Court of the State of California, without decision on July 14, 1949, Justices Jesse W. Carter and B. Rey Schauer voting for the hearing.

This is a companion case of the Petition for Certiorari in the case of Ben Sugarman vs. People of the State of California, we give that citation, which is *People of the State of California v. Don Burton, et al.*, 91 A.C.A. 817, 205 Pac. (2d) 1065.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 2101 New Federal Judiciary Code and by Rule 38½ Rules of the Supreme Court of the United States.

The Petition for Writ of Habeas Corpus was filed in the Superior Court of the State of California in and for the County of San Joaquin, pursuant to California habeas corpus proceeding on June 9, 1949 and denied by that Court on that date. On June 10, 1949, the petition for writ of habeas corpus was filed in the District Court of Appeal, Third Appellate District, State of California, and denied by that Court on June 15, 1949.

The Petition for Writ of Habeas Corpus was then filed in the Supreme Court of the State of California on July 1, 1949, and denied by that Court on July 14, 1949, two justices, Jesse W. Carter and B. Rey Schauer, voting for a hearing. The Attorney General of the State of California, being the highest non-judicial officer of the State, also stipulated that the questions raised herein were of fundamental importance.

Petition for Certiorari is being filed in this Court within the 90 days permitted by the Statutes.

STATUTES INVOLVED.

The Statutes are set out in the petition *ante.*

SUMMARY STATEMENT OF THE FACTS AND THE ISSUES INVOLVED.

The facts which lead to the petition for certiorari in the case itself are set out in the Petition for a Writ of Certiorari in the case of Ben Sugarman vs. People of the State of California, and are therefore incorporated herein by reference. However, in this Habeas Corpus proceeding before this Court we set out that the defendant was placed upon trial upon a separate conspiracy, while other conspiracies separately charged, against two codefendants and other separate and distinct crimes charged against said codefendants were all joined and linked in the same indictment and tried before the same jury; that 75% or more of the evidence in the case was wholly unrelated to this defendant involving separate charges and separate conspiracies against separate defendants and at different times and against different alleged victims. This is undenied in any return.

The Petition for the Writ also asserts that Sections 954 and 1098 of the Penal Code permitting such a procedure, as thus construed and thus applied, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States. That mass trials as such ought not to be permitted in the United States.

SPECIFICATION OF ERRORS PRESENTED BY THE WRIT OF CERTIORARI.

(1) The Supreme Court of the State of California erred in construing and applying Sections 954 and 1098 of the Penal Code of the State of California in this case in a manner that would permit the trial en masse of the defendant on a separate and distinct charge of conspiracy with two other defendants separately charged with separate and distinct other conspiracies and other offenses, and to place those issues before one and the same jury and be tried all at one time wherein seventy-five per cent or more of the evidence was in no way related to the petitioner.

(2) The Supreme Court of the State of California erred in holding that such a procedure and proceeding constituted fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(3) The defendant was singled out for invidious treatment by the State of California since in all other cases heretofore it was held that such procedure is not permitted.

THE SUPREME COURT OF THE STATE OF CALIFORNIA ERRED IN CONSTRUING AND APPLYING SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA IN THIS CASE IN A MANNER THAT WOULD PERMIT THE TRIAL EN MASSE OF THE DEFENDANT ON A SEPARATE AND DISTINCT CHARGE OF CONSPIRACY WITH TWO OTHER DEFENDANTS SEPARATELY CHARGED WITH SEPARATE AND DISTINCT OTHER CONSPIRACIES AND OTHER OFFENSES, AND TO PLACE THOSE ISSUES BEFORE ONE AND THE SAME JURY TO BE TRIED ALL AT ONE TIME WHEREIN SEVENTY-FIVE PER CENT OR MORE OF THE EVIDENCE WAS IN NO WAY RELATED TO THE PETITIONER. SUCH STATUTES, AS THUS CONSTRUED AND APPLIED, VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is highly important that this Court grant a hearing to determine the fundamental issues of criminal law and procedure involving due process within the United States as raised by this case. The Attorney General of California, being the highest non-judicial officer of the State, recognized the importance of this issue and urged that it be judicially determined. Various public defenders of the State of California did likewise. District Attorneys of different counties opposed such a hearing as they wanted the law to remain as now construed by the highest Court of the State of California.

Thus, the fundamental question in this case ought to be determined by this Court, namely, *whether a State may, under the concept of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, adopt such unfair trial procedure and practice as to result in unfair trial from mass trials of a person accused with other persons in*

one conspiracy where other persons are charged in other and separate and distinct conspiracies.

In this Habeas Corpus proceeding, we specifically challenge the constitutionality of Sections 954 and 1098 of the Penal Code of California as construed and applied in this case, and the highest Court of the State of California denied our challenge.

CASES BELIEVED TO SUSTAIN OUR SPECIFICATIONS.

Pointer v. United States, 151 U.S. 396, 399, 404;
Optner v. United States, 13 Fed. (2d) 11, 12;
Ashe v. United States, 2 Fed. (2d) 735;
Krulewitch v. United States, 93 L.Ed. 623;
Re Oliver, 333 U.S. 257;
Kotteakos v. United States, 328 U.S. 750, 90 L.Ed. 1557;
McElroy v. United States, 164 U.S. 76, 41 L.Ed. 355;
Carter v. Illinois, 329 U.S. 173, 91 L.Ed. 172;
Buchalter v. New York, 319 U.S. 427, 87 L.Ed. 1492;
Resweber v. Louisiana, 329 U.S. 459;
Lisenba v. California, 314 U.S. 219, 86 L.Ed. 166;
Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791;
De Jonge v. Oregon, 299 U.S. 353;
Heber v. Louisiana, 272 U.S. 312;
People v. Davis, 42 Cal. App. (2d) 70;
People v. Brower, 207 Pac. (2d) 571.

In *People v. Davis,* 42 Cal. App. (2d) 70 at 75, it is stated:

> "every case that we have found involving a situation similar to that here presented has resulted in a reversal on the ground that error was prejudicial. (*Brimie v. United States,* 200 Fed. 726 [119 C.C.A. 170]; *Coco v. United States,* 289 Fed. 33; *Callahan v. United States,* 299 Fed. 172; *Zedd v. United States,* 11 Fed. (2d) 96; *Castellins v. United States,* 64 Fed. (2d) 636; *Cutjak v. United States,* 53 Fed. (2d) 554.) There is a good discussion of the various types of factual situations that may be presented in *United States v. Ashe,* 2 Fed. (2d) 735, 738."

Except for the fact that we specifically challenge the constitutionality of the Statutes in this proceeding, as construed and applied, and the fact that the case was thus presented to the highest Court of the State of California (the Supreme Court of the State of California) our basic argument throughout this case is identical with that of our Petition for Certiorari in the case of People vs. Sugarman from the judgment itself. Therefore, in the interest of economy of time and the convenience of the Court, we adopt by reference here all the arguments presented in that petition as though fully set forth herein.

The questions in each of the cases are substantial and the two cases should no doubt be heard together and consolidated as were the appeals from the judgment in the case of *Lisenba v. California* and from the habeas corpus proceeding in that case (314 U.S. 219, 86 L.Ed. 1492).

Wherefore, the petitioner prays that this Honorable Court grant the writ of certiorari and reverse the judgments of the Court below.

Dated, Los Angeles, California,
September 21, 1949.

Respectfully submitted,
MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
Of WILLENS AND BOSCOE,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No.

BEN SUGARMAN,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,
Respondent.

MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE RECORD.

Comes now, the petitioner Ben Sugarman and moves this Honorable Court to dispense with the printing of the record on the Petition for Certiorari and on the hearing thereof. The typewritten certified copy of the record has been furnished to this Court.

The petitioner is in prison at San Quentin, California and therefore requests the dispensing of the costs in connection with the printing of the record.

Dated, Los Angeles, California,
September 21, 1949.

MORRIS LAVINE,
Attorney for Petitioner.

MAX WILLENS,
Of WILLENS AND BOSCOE,
Of Counsel.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 355

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

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In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. ----

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the Supreme Court of the State of California to review the order of said court denying without opinion the petition of BEN SUGARMAN for a writ of habeas corpus.

Subsequent to a final decision in the case of *People* v. *Burton, Martin, and Sugarman,* 91 Advance California Appellate Reports 817, 205 P. (2) 1065, on June 9, 1949, this petitioner filed an application for writ of habeas corpus in the Superior Court of the State of California, in and for the County of San Joaquin. This petition, raising no matters not heretofore presented to the appellate courts on the appeal from the original judgment, was denied without opinion on said date. On June 10, 1949, the petitioner filed a petition for writ of habeas corpus with the District Court of Appeal of the State of California, in and for the Third Appellate District. This petition was denied without opinion by said court on June 15, 1949. Thereafter, on July 1, 1949, petitioner filed a petition for writ of habeas corpus with the Supreme Court of the State of California, which said petition was denied without opinion by said court on July 14, 1949. No petition for rehearing, however, was filed with said Supreme Court of the State of California. Thereafter petitioner filed this petition for writ of certiorari within the 90-day period as provided by Rule 38½ of the Rules of the Supreme Court of the United States.

In view of the inaccuracies contained in petitioner's statement of facts in the petition for writ of certiorari from the judgment of the District Court of Appeal of the State of California (which petitioner has incorporated by reference in this petition), respondent in its brief in opposition thereto has set forth

an additional statement pursuant to Section 4 of Rule 27 of this court. This statement of facts contained in respondent's brief is hereby readopted by reference as though fully set forth herein.

As appears from both of the petitions for writ of certiorari, the points raised by petitioner herein are the same. He challenges the constitutionality of Sections 954 and 1098 of the Penal Code of the State of California as construed and applied to the petitioner Sugarman, alleges that the trial was unfair and that he was "singled out for invidious treatment by the State of California in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States."

The Attorney General of the State of California signed a stipulation at the time the petition for writ of habeas corpus was presented to the Supreme Court of the State of California, to the effect "that a hearing may be granted in the above-entitled matter to settle the important constitutional questions involved under state and federal procedure for separate trials in this State on the constitutionality of the statutes involved."

However, the action of the Supreme Court of the State of California in denying said petition for writ of habeas corpus merely affirmed the respondent's contentions maintained throughout the original action on the merits that the provisions of the applicable statutes, Sections 954 and 1098, were constitutional in their application to petitioner; that the matter was a

question of state procedure and that in no manner had the petitioner herein affirmatively shown that he was "singled out for invidious treatment by the State of California in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

ARGUMENT

SUMMARY OF ARGUMENT

I. The Petition for Writ of Habeas Corpus Does Not Lie in the Instant Matter.

II. Sections 954 and 1098 of the Penal Code of the State of California as Construed and Applied in the Instant Matter Are Constitutional.

III. The Instant Proceedings Did Not Violate the Due Process or Equal Protection Provisions of the Federal Constitution as Contained in the Fourteenth Amendment.

I. The Petition for Writ of Habeas Corpus Does Not Lie in the Instant Matter

Although habeas corpus has been considered a proper vehicle for invoking the decision of the state appellate courts upon the constitutionality of an ordinance and the validity of a petitioner's restraint thereunder, *it is not the equivalent of an appeal* and may not be used as a device for the correction of mere errors or irregularities committed within the exercise of the court's admitted jurisdiction.

In re Porterfield, 28 Cal. (2) 91, 168 P. (2) 706;
Ex parte Drew, 188 Cal. 717, 720, 207 P. 249;
In re Bell, 19 Cal. (2) 488, 122 P. (2) 22;
Bowen v. *Johnston,* 306 U. S. 19, 26-27, 59 S. Ct. 442, 83 L. Ed. 455.

In this matter, the question of the constitutionality of Sections 954 and 1098 of the Penal Code of the

State of California and their application to the petitioner herein was discussed by the District Court of Appeal in its decision on the appeal in said action (*People* v. *Burton, et al.,* 91 A. C. A. 817, 205 P.(2) 1065), and the constitutionality of said sections upheld. The question was again raised in the petitions for rehearing and hearing before the Supreme Court of the State of California, both of which petitions were denied. Thus it appears that the matter was fully considered by the appellate courts of the State and this situation may not be considered in the same category as a conviction based upon an ordinance where the court of last resort would be the Superior Court of the State and habeas corpus properly issued from the appellate courts to review the constitutionality of such ordinance.

Petitioner herein has raised no points which have not hitherto been considered by the courts of the State of California and respondent would respectfully direct the court's attention to the respondent's briefs filed in the District Court of Appeal of the State of California, in and for the Third Appellate District, in the action entitled *People* v. *Burton, et al.,* 91 A. C. A. 817, 205 P. (2) 1065 (the appeal on the merits), respondent's answer to the petition for rehearing, and its answer to the petition for hearing in the California Supreme Court.

It is apparent that the issues were not so confounded and confused that an innocent person was lost in his defense. Nor may it be urged that peti-

tioner herein was the victim of "mass trials." He was indicted with two codefendants. Each was found guilty of the crimes charged. The appellate courts of the State of California reviewed in detail the evidence presented and the instructions given to the jury. Any error complained of in such trial proceeding was within the scope of the state court's review on appeal and an attack by way of habeas corpus may not be made.

In re Porterfield, 28 Cal. (2) 91, 168 P. (2) 706;
In re Lindley, 29 Cal. (2) 709, 177 P. (2) 918;
Bowen v. *Johnston,* 306 U. S. 19, 26-27, 59 S. Ct. 442, 83 L. Ed. 455.

II. Sections 954 and 1098 of the Penal Code of the State of California as Construed and Applied in the Instant Matter Are Constitutional

The original transcript in this matter contained some 6,000 pages of testimony. True, there were conflicts in the evidence; however, such conflicts were resolved against the defendants and the petitioner herein by the jury and affirmed on appeal.

People v. *Newland,* 15 Cal. (2) 678, 104 P. (2) 778;
People v. *Perkins,* 8 Cal. (2) 502, 66 P. (2) 631.

Contrary to petitioner's contention, at least 75 percent of the evidence adduced at the joint trial would have been admissible against petitioner Sugarman on a separate trial. An examination of the entire record in this matter disclosed that approximately 90 of the 108 witnesses called by both the prosecution and the

defense, gave testimony which would have been admissible in a separate trial of petitioner Sugarman. All of such testimony related to the extent of the damage, if any, caused by the fire, which was the substantial element of importance common to all the charges of the indictment.

An examination of the entire record in the court below demonstrates that the determination of the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process.

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166.

It should be remembered that the joinder of the offenses and the defendants in the original proceeding in this case was pursuant to the specific provisions of the California statutes permitting such action.

Section 954 of the California Penal Code (set forth in appendix) permits the joinder in an indictment of two or more different offenses which are connected together in their commission or two or more different offenses of the same class of crimes.

To render the joining of counts in an indictment valid, the Supreme Court of the State of California in the case of *In re Pearson,* 30 Cal. (2) 871, 186 P. (2) 401, has held it to be sufficient if the offenses are of the same class or "if there is a common element of substantial importance in their commission." The District Court of Appeal of the State of California in its decision on this case on the merits (*People* v.

Burton, et al., 91 A. C. A. 817, 205 P. (2) 1065) stated:

> "It clearly appears that in each of the main circumstances the occurrence of the fire, the subsequent attempts to defraud the insurers, and the filing of false claims and appraisals is a common element of substantial importance in the offenses included in the indictment so as to permit their joinder."

To the same effect, see:

People v. *Bundte,* 87 C. A. (2) 735, 197 P. (2) 823, (cert. den. 337 U. S. 915);
People v. *Moore,* 87 C. A. (2) 753, 197 P. (2) 835, (cert. den. 337 U. S. 915);
People v. *Duane,* 21 C. (2) 71, 130 P. (2) 123;
People v. *Jordan,* 24 C. A. (2) 39, 74 P. (2) 519;
People v. *Flores,* 62 C. A. (2) 700, 145 P. (2) 318;
People v. *Guerrero,* 22 C. (2) 183, 137 P. (2) 21;
People v. *Grossman,* 28 C. A. (2) 193, 82 P. (2) 76;
People v. *Scott,* 24 C. (2) 774, 778, 151 P. (2) 517.

In the case of *People* v. *Grossman,* 28 C. A. (2) 193, 82 P. (2) 76, the point here presented—the question of joinder of offenses—was raised. Appellant in the *Grossman* case was convicted on an indictment charging six counts: (1) conspiracy to commit grand theft; (2) attempt to commit grand theft; (3) a violation of Section 556(a) of the Insurance Code of the State of California; (4) a violation of Section 556(b) of the Insurance Code of the State of California; (5) a violation of Section 556(b) of the

Insurance Code of the State of California, and (6) conspiracy to violate Section 556 of the Insurance Code. The counts were pleaded in one indictment and defendant contended Section 954 of the Penal Code of the State of California permitting such joinder was unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. The court in refuting such statement used the following language:

> "*People* v. *Kelly,* 203 Cal. 128 (263 Pac. 226) and *In re Culver,* 84 Cal. App. 295 (257 Pac. 876), each hold that section 954 is not invalid. The latter case holds it is not vulnerable to the attack the defendant makes."

Section 1098 of the Penal Code of the State of California (set forth in appendix), deals with the trial of defendants who have been charged jointly, the requirement being that they be tried jointly unless the court shall order separate trials. This section is declaratory of the common law.

People v. *Perry,* 195 Cal. 623, 234 P. 890.

In the case of *People* v. *Yeager,* 194 Cal. 452, 229 P. 40, the validity of this section was upheld and the court stated:

> "It is within the province of the legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged."

Again, in the cases of *People* v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dismissed, 278 U. S. 660), and

People v. *England,* 140 Cal. App. 310, 315, 35 P. (2) 565, wherein the validity of the statute was in issue, the courts of the State of California found that there was no federal question, constitutional or otherwise, involved.

23 *Corpus Juris, Secundum,* Sec. 933, p. 219;
16 *Corpus Juris, Secundum,* Sec. 581, p. 1186.

The law of the State of California, as does the federal law, vests the trial court with discretion in granting a separate trial and this discretion will not be interfered with by an appellate court in the absence of a showing of abuse of such discretion.

People v. *Baa,* 24 Cal (2) 374, 150 P. (2) 1;
People v. *King,* 30 Cal. App. (2) 185, 85 P. (2) 928;
People v. *Isby,* 30 Cal. (2) 879, 897, 186 P. (2) 405;
4 *Cal. Jur., 10 Yr. Supp.* (1943 Rev.), Sec. 268, p. 718; Note: 104 A. L. R. 1519.

The appellate courts of the State of California found that the trial court acted within its discretion in so denying petitioner a separate trial, and petitioner has cited no competent authority, federal or state, showing that such discretion was abused or that Sections 954 or 1098 of the Penal Code of the State of California are, or should be, held unconstitutional in their application to petitioner.

III. The Instant Proceedings Did Not Violate the Due Process or Equal Protection Provisions of the Federal Constitution as Contained in the Fourteenth Amendment

To afford due process of law an indictment or information must contain a statement of the facts which constitute the offense with reasonable certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense. Due process is not denied by the charging of two or more different offenses of the same class of crimes in one indictment or information nor the joinder of defendants.

16 *Corpus Juris, Secundum,* Sec. 587, p. 1180;
42 *Corpus Juris, Secundum,* Sec. 180, p. 1140.

Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383;
Hurtado v. *State of California,* 110 U. S. 516, 4 S. Ct. 111.

In this matter in accordance with the established law of the State of California, the three defendants were charged with the offenses listed in the indictment. Petitioner has not demonstrated that the action of the trial court in denying his motion for a severance constituted an abuse of discretion by such trial court. The appellate courts of California found that

the trial court acted within the bounds of its discretion in denying such motion as the great majority of the evidence adduced at the joint trial would have been admissible against petitioner in a separate trial. Thus petitioner has not established how or in what manner his rights were prejudiced by the application of the provisions of Sections 954 and 1098 of the Penal Code of the State of California to his case.

The cases cited by petitioner in support of his specifications of error do not constitute authority therefor. *Ashe* v. *United States,* 2 F. (2) 735, was reversed by this court in the case of *Ashe* v. *Valotta,* 270 U. S. 424. *Kotteakos* v. *United States,* 328 U. S. 750, 90 L. Ed. 1557, involved a prosecution in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy, that the jury could not possibly have found only one conspiracy, and therefore the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. *Carter* v. *Illinois,* 329 U. S. 173, involved the denial of right to counsel. *In re Oliver,* 333 U. S. 257, held that an accused who was tried and convicted for contempt of court under order of a one judge-grand jury in grand jury secrecy was not afforded a reasonable opportunity to defend himself and therefore, was denied procedural due process. *Francis* v. *Resweber,* 329 U. S. 459, involved a claim of double jeopardy and cruel and unusual punishment in that the execution of a convicted de-

fendant failed because of mechanical difficulties and the state's rights to again attempt his execution was upheld. In this case the court used language directly applicable to this matter:

> "So long as the law applies to all alike, the requirements of equal protection are met."

The case of *Krulewitch* v. *United States,* 93 L. Ed. 623, merely holds that extra-judicial declarations of a co-conspirator were not admissible when made after the conspiracy was over. *Mooney* v. *Holohan,* 294 U. S. 103, involved the use of perjured testimony knowingly by the prosecution. No such claim was or could be made in the instant matter.

In *De Jonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255, a conviction for violation of Oregon's Criminal Syndicalism Law was reversed. There it was held that a conviction under such statute for participation in a public meeting, otherwise lawful, merely because it was held under the auspices of an organization which advocated use of violence to effect political change although no such teaching was made at the meeting, violated the right of free speech and assemblage. None of the remainder of the cases cited by petitioner is factually similar to the case at bar nor presents similar problems. Respondent would note, however, that the language of this court in the case of *Carter* v. *Illinois,* 329 U. S. 173, is directly applicable to the instant matter.

> "But the due process clause has never been perverted so as to force upon the 48 States a uni-

> form code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual states. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. *Brown* v. *New Jersey,* 175 U. S. 172, 175; *Missouri* v. *Lewis,* 101 U. S. 22, 31."

In the case of *People* v. *Davis,* 42 Cal. App. (2) 70, 108 P. (2) 85, the question presented was whether the court could consolidate for trial indictments charging different defendants who also were charged with different, *unconnected* offenses, and the court held that was improper. This, however, was not the factual situation in the instant case where the offenses all arose out of one transaction, and were included within one indictment. Likewise, in the case of *People* v. *Brower,* 92 A. C. A. 668, 207 P. (2) 571, the petitioner has quoted from and relied on the dissenting opinion in said case and not the majority opinion which upheld the judgment of the trial court.

CONCLUSION

Upon the record and for the reasons stated respondent sincerely believes that the decision of the California Supreme Court denying the petition for writ of habeas corpus was correct. That the points

sought to be raised on the petition for writ of habeas corpus were within the scope of review on appeal by the state courts; that the judgment of the state court on the merits upholding the application of Sections 954 and 1098 of the Penal Code of the State of California to the instant matter were proper; that said sections are constitutional both under the state and federal constitutions and that petitioner in no wise has demonstrated that he has been singled out for such invidious treatment by the state courts resulting in denial of due process of law as would warrant this court in issuing the writ prayed for.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

Respectfully submitted,

FRED N. HOWSER
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State of California
Attorney for Respondent

Of Counsel:

DORIS H. MAIER
Deputy Attorney General

CHESTER E. WATSON
District Attorney
County of San Joaquin

Dated, Sacramento, November 4, 1949

In the Supreme Court
OF THE
UNITED STATES

No. ----

BEN SUGARMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,
Respondent.

OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

Comes now, the respondent The People of the State of California and objects to the request of petitioner to dispense with the printing of the record on the Petition for Certiorari and on the hearing thereof in that petitioner herein has presented no grounds to the court to except himself from the provisions of Rule 38 of the Rules of the Supreme Court and that he should not be entitled to the granting of such motion without a showing that petitioner is insolvent and unable to bear the burden placed upon litigants in

this court who also are and have been in prison pending the application for a writ of certiorari to this court.

Dated: Sacramento, California
November 4, 1949

FRED N. HOWSER
Attorney General of the
State of California
Attorney for Respondent

Of Counsel:

DORIS H. MAIER
Deputy Attorney General

CHESTER E. WATSON
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APPENDIX

California Penal Code, Section 954

An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes of offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

California Penal Code, Section 1098

When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the

court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

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